SUPREME COURT, U.S.
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No. 92-1190

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ALAN F. GERSMAN, *et al.*,
Petitioners,

v.

GROUP HEALTH ASSOCIATION, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Section 101 of the Civil Rights Act of 1991, which was enacted to expand the scope of 42 U.S.C. § 1981, applies retroactively to cases pending on appeal on the Act's effective date.

STATEMENT REQUIRED BY RULE 29.1

Group Heath Association, Inc. has no publicly-owned parent, subsidiaries or affiliates.

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BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

This case involves the termination of a commercial service contract between respondent Group Health Association, Inc. ("GHA") and petitioner Computer Security International, Inc. ("CSI"). In August 1983, GHA entered into a contract with CSI for the off-site storage and retrieval of GHA's computer tapes. The initial term of the agreement was one year. Thereafter, the contract would automatically renew for successive one-month periods until either party terminated it on thirty days notice. Pet. App. 90a. The agreement remained in effect on its original terms (except for price adjustments) until October 1987, when GHA notified CSI that it was terminating the contract.

CSI and Gersman subsequently brought this action against GHA alleging that the contract was "cancelled and not renewed" because Gersman is Jewish. CSI and Gersman contended that the contract termination violated both § 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1990), and § 1-2511 of the District of Columbia Human Rights Act ("DCHRA"), D.C. Code § 1-2511 (1991).

The district court dismissed both counts of the complaint for lack of standing and failure to state a claim. Pet. App. 91a-99a. The court of appeals, while disagreeing that CSI lacked standing (Pet. App. 65a-70a), affirmed the dismissal of the case on the grounds that Gersman and CSI failed to state a claim under § 1981 or the DCHRA. Pet. App. 70a-80a. With respect to the federal statute, the court agreed with all of the other federal circuits, holding that, under this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), § 1981 does not cover contract terminations. Applying that principle to the facts before it, the court held that GHA's actions, whether characterized as a termination of or a failure to renew the contract, were "postformation conduct" as defined in *Patterson*.

After the court of appeals' judgment, but while petitioners' original petition for certiorari was pending before this Court, Congress enacted the Civil Rights Act of 1991. The Act included a provision expanding the protections afforded by § 1981. In particular, Section 101 of the Act provided that the discriminatory termination of contracts would be prohibited by § 1981. On January 27, 1992, this Court granted the writ of certiorari and remanded the case to the court of appeals for consideration of the effect of the Civil Rights Act of 1991 on the legal sufficiency of petitioners' claims.

On remand, the court of appeals held that Section 101 does not apply to cases pending on appeal when the Act went into effect, concluding that "[t]he rights of the

parties must be adjudicated as they were under the law prevailing at the time of the contract." Pet. App. 30a. Accordingly, the court affirmed its previous dismissal of petitioners' claims.

REASONS FOR DENYING THE WRIT

I. THERE IS NO SIGNIFICANT CONFLICT AMONG THE FEDERAL APPELLATE COURTS

Petitioners' principal argument is that a conflict exists in the circuits regarding the retroactivity of the Civil Rights Act of 1991. Petitioners characterize the circuits as "splintered." Pet. 5.

Petitioners' assertion of an inter-circuit conflict is untenable in this particular case. On the retroactivity of Section 101 of the Act—the only provision of the Act at issue in this case—the circuits are united in their holdings. Every court of appeals that has considered the question has agreed with the court below and ruled that Section 101 is to be applied prospectively only. *E.g.*, *Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370 (11th Cir. 1992); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992); *Holt v. Michigan Dep't of Corrections*, 974 F.2d 771 (6th Cir. 1992); *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225 (7th Cir. 1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992).

Petitioners predicate their claim of a conflict among the circuits on a decision by the Ninth Circuit in *Davis v. City and County of San Francisco*, 976 F.2d 1536 (9th Cir. 1992). Pet. 6. After the instant petition for certiorari was filed, the Ninth Circuit vacated that portion of the *Davis* opinion that addressed the Act's retroactivity. *Davis v. City and County of San Francisco*, No. 91-15113, 1993 WL 23765 (9th Cir. Feb. 5, 1993) (vacating as moot that portion of the opinion applying Section 113 of the Civil Rights Act of 1991).

It is true that the Ninth Circuit has recently issued another decision, *Estate of Reynolds v. Martin*, No. 91-

15237, 1993 U.S. App. LEXIS 1974 (9th Cir. Feb. 9, 1993), holding that one section of the Act is retroactive, but the section of the Act at issue in *Estate of Reynolds*—Section 114(2)—does not address substantive rights and liabilities. To the contrary, Section 114(2) of the Act merely provides that pre- and postjudgment interest will be available to federal employees claiming discrimination to the same extent that such interest is available "in cases involving nonpublic parties." Pub. L. No. 102-166, 105 Stat. 1071 (1991). Because *Estate of Reynolds* and the numerous decisions holding that Section 101 is not retroactive address different and radically dissimilar provisions of the Act, they cannot be said to be in "conflict on the same matter." Supreme Court Rule 10.1(a).[1]

This difference in focus between the two Ninth Circuit decisions which have concluded that certain remedial provisions of the Act are retroactive and the federal appellate decisions which have all concluded that Section 101's creation of additional substantive rights and liabilities should not be applied retroactively shows that there is no real conflict among the federal courts of appeals. It also undercuts completely petitioners' suggestion that there is grave confusion among the lower courts about "this Court's jurisprudence on the presumptions to apply when congressional intent [concerning the retroactivity of a statute] is not clear." Pet. 5. The court below, along with other appellate courts, has not found this Court's reasoning impenetrable. After carefully considering the pertinent decisions of this Court, the District of Columbia Circuit recognized that the apparent tension between decisions such as *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), which read broadly might suggest that there is a presumption that statutes apply retroactively, and *Bowen v. Georgetown University Hos-*

[1] Significantly, the vacated *Davis* decision likewise did not hold that any provision of the Act affecting substantive rights and liabilities is retroactive. The section of the Act at issue in *Davis*, Section 113, provides for the award of expert witness fees.

pital, 488 U.S. 204 (1988), which states that statutes are presumed to apply prospectively only, may be resolved by a closer scrutiny of this Court's decisions. In particular, the court below was informed by this Court's decision in *Bennett v. New Jersey*, 470 U.S. 632 (1985).

Bennett held that substantive provisions of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. § 241(a), *et seq.*, could not be applied retroactively. *Bennett* sharply distinguished *Bradley* by observing that *Bradley* involved the retroactivity of a remedial provision, specifically, a provision authorizing the allowance of attorney's fees. *Bennett* reasoned that because the *Bradley* Court was limited to the consideration of a remedial provision, the holding in *Bradley* did not depart from the "venerable rule of statutory interpretation, *i.e.*, that statutes affecting substantive rights and liabilities are presumed to have only prospective effect." *Id.* at 639.

The court below concluded that *Bennett* provided the means for reconciling *Bradley* and *Bowen*: "The *Bowen* presumption must apply in the case of changes in substantive law," while *Bradley* would govern the application of remedial procedural provisions. Pet. App. 26a-27a. In this conclusion as to the applicability of the *Bradley* and *Bowen* presumptions, the court below has been joined by the Eleventh and Fifth Circuits. *Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370, 1374 (11th Cir. 1992); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1373-74 (5th Cir. 1992).

Accordingly, the rulings that petitioners tendentiously characterize as evidence of a split in the circuits occasioned by misunderstanding of this Court's decisions, actually exemplify the consistent application of this Court's decisions to differing types of statutory provisions. The actual holdings of the numerous appellate courts that have concluded that Section 101 is not retroactive do not diverge from the Ninth Circuit's decisions in *Davis* (now

vacated) and *Estate of Reynolds*, which held certain remedial provisions of the Act retroactive. There is no conflict among the federal appellate courts that warrants intervention by this Court.[2]

II. THERE IS NO MERIT IN PETITIONERS' SUGGESTION THAT THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW MISAPPLIED RELEVANT LAW

Implicitly conceding that their contention that there is a conflict among the circuits might not be found persuasive, petitioners urge the Court to grant their petition on the ground that "legislation designed to nullify a decision of this Court" is "generally applied . . . to cases pending upon enactment." Pet. 10, 11. In support of this ostensible maxim of statutory interpretation, petitioners cite decisions interpreting the Civil Rights Restoration Act, Pub. L. No. 100-259, 102 Stat. 28 (1988). Pet. 11. Petitioners then argue that because Congress enacted Section 101 "to disavow" this Court's decision in *Patterson* "and to restore 42 U.S.C. § 1981 to its pre-*Patterson* state," the court below erred in not applying Section 101 retroactively.[3]

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[2] Even if one characterizes as a "conflict" the differing analyses of statutory retroactivity offered in dicta by the Ninth Circuit and the other federal appellate courts, the petition should not be granted. A conflict among the federal appellate courts is often a necessary but never a sufficient precondition for review by this Court. "[I]t . . . regularly happens that certiorari is denied in other cases presenting" conflicts. *Beaulieu v. United States*, 110 S. Ct. 3302 (1990) (Justice White dissenting from denial of certiorari). Particularly in cases in which an issue of statutory interpretation will become moot through the passage of time, the Court has been reluctant to grant certiorari. *See* Robert L. Stern, *Denial of Certiorari Despite a Conflict*, 66 Harv. L. Rev. 465, 470 (1953). Here, of course, the issue of the Act's retroactivity will affect only a finite number of cases and will be moot once these cases have been processed through the courts.

[3] This argument by petitioners appears to be an argument on the merits, and it is unclear why petitioners regard it as advanc-

However, although there is no dispute that a majority of Congress was dissatisfied with the result in *Patterson*, the plain language of the Act belies the claim that Section 101 seeks "to restore" the law to its pre-*Patterson* state. The statement of the Act's purpose relevant to Section 101 is found in Section 3(4) of the Act, which unambiguously provides that the Act is designed, in pertinent part:

> to respond to recent decisions of the Supreme Court *by expanding* the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

Pub. L. No. 102-166, 105 Stat. 1071 (1991) (emphasis added). Congress intended to, and did, *expand* the scope of 42 U.S.C. § 1981. Congress intended to, and did, create new substantive rights and liabilities. The Act's statement of purpose is by itself sufficient to remove the linchpin of petitioners' argument.

In stark contrast to the express intent of Congress to expand the scope of 42 U.S.C. § 1981, Congress in enacting the Civil Rights Restoration Act included in Section 2 of that statute explicit language confirming its intention "to restore the prior consistent . . . interpretation" of Title VI of the Civil Rights Act of 1964. Thus, Congress unmistakably indicated that the Civil Rights Restoration Act was, as its very title implies, "restorative," not expansive, and the appellate courts that applied this statute retroactively relied on this explicit statement of congressional intent. *Lussier v. Dugger*, 904 F.2d

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ing a reason why the petition should be granted. None of the decisions that petitioners cite in support of their maxim of statutory interpretation are decisions of this Court. *Cf.* Supreme Court Rule 10.1(c) (a consideration weighing in favor of review by the Court is a conflict between the ruling of a federal appeals court on an important question of federal law and "applicable decisions of this Court.").

661, 666 n.6 (11th Cir. 1990); *Ayers v. Allain*, 893 F.2d 732, 755 (5th Cir.), *vacated on other grounds*, 914 F.2d 676 (5th Cir. 1990), *vacated and remanded on other grounds sub nom. United States v. Fordice*, 112 S. Ct. 2727 (1992). Clearly, the absence of such a statement of congressional intent in the Civil Rights Act of 1991 renders these cases inapposite.

Furthermore, contrary to the petitioners' assertion that "nullifying" legislation is generally applied retroactively, there are numerous decisions applying statutes that were enacted to change this Court's interpretation of the law in which these statutes were not applied retroactively. *E.g., Condit v. United Air Lines, Inc.*, 631 F.2d 1136, 1139-40 (4th Cir. 1980) (Pregnancy Discrimination Act, designed to change this Court's interpretation of relevant law in *General Electric v. Gilbert*, 429 U.S. 125 (1976), does not apply retroactively); *Sikora v. American Can Co.*, 622 F.2d 1116, 1121 (3d Cir. 1980) (amendments to Age Discrimination in Employment Act directed at Supreme Court interpretation do not apply retroactively). The canon of statutory construction that these cases reveal is not the counterfeit one proffered by petitioners, but rather the following time-honored rule: "The usual purpose of a special interpretive statute is to correct a judicial interpretation of a prior law which the legislature determines to be inaccurate. Where such statutes are given any effect, the effect is prospective only," 1A N. Sands, *Sutherland Statutory Construction* § 27.04 (4th ed. 1985).

As Congress plainly stated that Section 101 of the Act expanded existing civil rights protection, the only rationally defensible conclusion is that Section 101 is to be applied prospectively only. Petitioners have not provided any cogent argument for granting their petition.

III. THE JUDGMENT BELOW MAY BE AFFIRMED ON OTHER GROUNDS

After the filing of the instant petition and respondent's preparation of its brief in opposition, the Court granted the petition in *Harvis v. Roadway Express, Inc.*, 973 F.2d 490 (6th Cir. 1992), *cert. granted sub nom. Rivers v. Roadway Express, Inc.*, No. 92-938 (Feb. 22, 1993). Respondent respectfully submits that the foregoing arguments retain their validity.

In any event, there is an additional reason why the Court should deny the petition. As the district court originally held, petitioners not only fail to state a claim, but they also lack standing to pursue their claims. Pet. App. 97a-99a. The injury, if any, in this case was suffered by petitioner CSI, not its president Gersman. *Id.* As to CSI, the district court concluded that this corporation could not maintain an action for discriminatory termination of a contract because it had no racial or ethnic identity. The district court relied on this Court's ruling in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 263 (1977), in which the Court stated that "a corporation . . . has no racial identity and cannot be the target of the alleged discrimination." The court of appeals disagreed, concluding that CSI (but not Gersman) did have standing. Pet. App. 65a-70a.

Respondent submits that the district court properly interpreted this Court's decisions in finding that the corporation, CSI, lacked standing to pursue a claim under § 1981. Accordingly, petitioners' lack of standing presents an alternative basis for denying the petition. *See, e.g., Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979) (a prevailing party is "free to defend its judgment on any ground properly raised below whether or not that ground was . . . rejected . . . by the District Court or the Court of Appeals").

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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